Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Yellowknife Firefighters, Local 2890 of the International Association of Fire Fighters,

applicant,

and

City of Yellowknife,

employer.

Board File: 29300-C
Neutral Citation: 2012 CIRB **661**
November 5, 2012

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. John Bowman and André Lecavalier, Members.

Parties' Representatives of Record

Mr. Sean McManus, for the Yellowknife Firefighters, Local 2890 of the International Association of Fire Fighters;

Ms. Marie Couturier, for the City of Yellowknife.

These reasons for decision were written by Mr. Graham J. Clarke, Vice-Chairperson.

I–Nature of the Application

[1] Section 16.1 of the *Canada Labour Code (Part I–Industrial Relations)* (*Code*) provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to issue a decision without an oral hearing.

[2] This complaint considers whether section 49 of the *Code* sets a limited window within which a bargaining agent must give notice to bargain and, if so, what collective bargaining consequences flow from a notice which is filed after that window has closed.

[3] On March 5, 2012, the Board received an unfair labour practice (ULP) complaint from the Yellowknife Firefighters, Local 2890 of the International Association of Fire Fighters (IAFF), alleging that the City of Yellowknife (City) had failed to bargain in good faith, contrary to section 50 of the *Code*.

[4] The parties' collective agreement had a three-year term from January 1, 2009 to December 31, 2011. The parties' pleadings did not dispute that the IAFF provided a notice to bargain on January 13, 2012. Their dispute concerned whether that notice had any legal effect.

[5] The City argued that the IAFF's failure to file its notice to bargain within the alleged four-month window established by section 49 of the *Code* resulted, by virtue of section 67(1) of the *Code*, in the parties' collective agreement being automatically renewed for a year. As a result, no obligation to bargain in good faith could arise under section 50(*a*) of the *Code*.

[6] This case seemingly represents the first time the Board has considered whether section 49 establishes a "window" for giving notice to bargain, or whether it merely sets out the earliest date when one party to the collective agreement may oblige the other to negotiate. Section 49 also allows the parties to agree to extend the *Code*'s explicit four-month period.

[7] The Board has concluded that the IAFF's notice on January 13, 2012 was valid, but for reasons other than those submitted by the parties. The *Code* must be interpreted in a manner that is consistent for all parties falling within federal jurisdiction. Interpretations of the *Code* do not ebb and flow based on the contents of parties' private collective agreements.

[8] Due to the novelty of the issue, the Board has further decided to dismiss the IAFF's ULP complaint. The *Code* obliges the parties to bargain collectively for a new collective agreement.

II–Facts

[9] The facts are not disputed; neither party requested an oral hearing.

[10] Article 36.01 of the parties' most recent collective agreement contained an explicit three-year term (hereinafter, for ease of reference, Term) from January 1, 2009 to December 31, 2011.

[11] In its January 5, 2012 letter, the City advised the IAFF that their collective agreement had automatically been renewed for a year, since neither party had given notice to bargain prior to the expiration of the Term on December 31, 2011:

> Pursuant to Section 67(1) of the *Canada Labour Code*, please be advised that it is the position of the City of Yellowknife (the "City") that the current Collective Agreement between the City and Local 2890 with an end date of December 31, 2011 (the "C.A.") has been renewed for a term of one (1) year due to the failure of either party to give a notice to bargain. As such, the ending date has been revised to December 31, 2012.
>
> It is the City's opinion that Section 50 of the *Code* does not apply because no formal notice to bargain was served pursuant to Section 49(1) of the *Code*. Article 36.04 of the C.A. state that the C.A.remains [*sic*] in force after the expiry date until a new C.A. becomes effective. Section 67(1) of the *Code* states that where there is no provision as to the C.A.'s term, the minimum term as set out in the *Code* must be applied and the C.A.'s term is renewed for a minimum of one (1) year.
>
> Further to Section 49 of the *Code*, the Union or the City will be in a position to serve a notice to bargain after September 1, 2012.

[12] The IAFF responded on January 13, 2012 and argued the collective agreement allowed notice to bargain to be given after the Term:

The Union has received your letter regarding bargaining in 2012. The Union requests mutually acceptable dates to begin collective bargaining a renewed collective agreement, in accordance with the collective agreement Article 36.05 which states:

> "The Employer and Local 2890 **shall** choose a mutually acceptable date to discuss renewal of this Collective Agreement no more than four months immediately preceding the date of the expiration of the term of the collective agreement". (*emphasis added*)

In the Union's view, the Employer's narrow interpretation of the *Canada Labour Code* is misguided and not helpful. The *Code* clearly contemplates that the parties to a collective agreement may agree to provisions that provide for a longer notice to bargain period, than the four months you would suggest, Section 49(1) states:

> "Either party to a collective agreement may, within the period of four months immediately preceding the date of expiration of the term of the collective agreement, **or within the longer period that may be provided for in the collective agreement**, by notice, require the other party to the collective agreement to commence collective bargaining for the purpose of renewing or revising the collective agreement or entering into a new collective agreement". (*emphasis added*)

There is nothing in the collective agreement or the *Code* that prevents the parties from agreeing to start bargaining after the collective agreement has nominally expired. In fact, quite the contrary, Article 36.05 clearly states the parties **"shall"** chose dates to begin bargaining. Article 36.04 is clear that the collective agreement will remain in force after the expiry date until a new collective agreement becomes effective.

In the Union's view Section 49(1) is clear. The employer is required commence collective bargaining.

[*sic*]

[13] The City, in its January 18, 2012 letter, maintained its position that the expired collective agreement had been renewed for a period of one year pursuant to section 67(1) of the *Code*:

> The City of Yellowknife (the "City") acknowledges receipt of your letter dated January 13, 2012. The City agrees with your position that both the *Canada Labour Code* (the "*Code*") and the Collective Agreement allow for both parties to agree to a longer notice to bargain period. However, in this case, there has been no such agreement by the parties to an extension.
>
> Despite several attempts by the City to get the Local to provide dates as to when they would provide a formal notice to bargain, no such notice was provided prior to the deadline. In your correspondence you quote and bold Section 49(1) regarding the timelines "or within the longer period that may be provided for in the collective agreement." There is no such longer period provided for in the current Collective Agreement.

> The City agrees with the statement in your correspondence that "there is nothing in the collective agreement or the *Code* that prevents the parties from agreeing to start bargaining after the collective agreement has nominally expired". However, it is the City's position that such agreement can only occur once a notice to bargain has been given in accordance with the *Code* and both parties have agreed to an extension of the timelines.
>
> The City submits that Section 50 of the *Code* is clear and as advised in the City's letter dated January 5, 2012, due to the fact that no notice to bargain was given by the Local pursuant to Section 50 of the *Code*, this section is inapplicable.

[14] On August 14, 2012, after an initial review of the pleadings, and in order to ensure the Board had the parties' full legal submissions on certain unaddressed *Code* sections, it asked them to respond to three questions:

> 1. Given that the Board will interpret section 49(1) of the *Code* in this case, what is the impact, if any, of section 51(2)(*a*)(ii) of the *Code* on this interpretation?
>
> 2. What impact, if any, does section 48 of the *Code* have on the IAFF's January 13, 2012 notice?
>
> 3. Section 67(1) of the *Code* explicitly refers to a collective agreement which either "contains no provision as to its term", or which "is for a term of less than one year". What facts in this case, with reference to any applicable case law, cause this deeming provision either to apply, or not, to the parties' situation?
>
> (*City of Yellowknife*, 2012 CIRB LD 2860; page 3)

[15] Pleadings closed on October 2, 2012.

[16] The issues are several. Can a party give section 49 notice after the expiry of the Term in the collective agreement? If it fails to give notice, what are the consequences which follow? Is there another way for notice to bargain to be provided?

III–Relevant Provisions

[17] Both parties referred to Article 36 of their collective agreement, entitled "Duration and Renewal", in support of their various arguments:

ARTICLE
36
DURATION AND
RENEWAL

36.01 The term of this Collective Agreement shall be three (3) years from January 1, 2009 to December 31, 2011.

36.02 The salary schedule shall apply for the dates specified therein.

36.03 All other provisions of this Collective Agreement take effect on the date of signing unless another date is expressly stated therein.

36.04 Unless otherwise stipulated, this Agreement shall remain in force after the expiry date until a new Collective Agreement becomes effective. There shall be no strike, walkout, slow- down [*sic*], or suspension of work by any member(s) of Local 2890, or any lock-out of employees by the Employer.

36.05 The Employer and Local 2890 shall choose a mutually acceptable date to discuss renewal of this Collective Agreement no more than four (4) months immediately preceding the date of the expiration of the term of the collective agreement.

(emphasis added)

[18] Sections 48 and 49(1) of the *Code* apply to notices to bargain:

> 48. Where the Board has certified a bargaining agent for a bargaining unit and no collective agreement binding on the employees in the bargaining unit is in force, the bargaining agent may, by notice, require the employer of those employees, or the employer may, by notice, require the bargaining agent to commence collective bargaining for the purpose of entering into a collective agreement.
>
> 49.(1) Either party to a collective agreement may, within the period of four months immediately preceding the date of expiration of the term of the collective agreement, or within the longer period that may be provided for in the collective agreement, by notice, require the other party to the collective agreement to commence collective bargaining for the purpose of renewing or revising the collective agreement or entering into a new collective agreement.

[19] Once notice to bargain has been given, section 50 of the *Code* imposes an obligation to bargain in good faith for, and make every reasonable effort to enter into, a collective agreement. Section 50 also imposes a statutory freeze:

> 50. **Where notice to bargain collectively has been given under this Part,**
>
> > (*a*) **the bargaining agent and the employer**, without delay, but in any case within twenty days after the notice was given unless the parties otherwise agree, **shall**

(i) meet and commence, or cause authorized representatives on their behalf to meet and commence, **to bargain collectively in good faith**, and

(ii) **make every reasonable effort to enter into a collective agreement;** and

(*b*) **the employer shall not alter the rates of pay or any other term or condition of employment or any right or privilege of the employees in the bargaining unit**, or any right or privilege of the bargaining agent, until the requirements of paragraphs 89(1)(*a*) to (*d*) have been met, unless the bargaining agent consents to the alteration of such a term or condition, or such a right or privilege.

(emphasis added)

[20] Section 51(2), dealing with technological changes, references section 48 and 49 notices to bargain:

51.(2) Sections 52, 54 and 55 do not apply, in respect of a technological change, to an employer and a bargaining agent who are bound by a collective agreement where

(*a*) the employer has given to the bargaining agent a notice in writing of the technological change that is substantially in accordance with subsection 52(2),

(i) prior to the day on which the employer and the bargaining agent entered into the collective agreement, **if the notice requiring the parties to commence collective bargaining for the purpose of entering into that collective agreement was given pursuant to section 48**, or

(ii) not later than the last day on which notice requiring the parties to commence collective bargaining for the purpose of entering into the collective agreement could have been given pursuant to subsection 49(1), if the notice was given under that subsection;

(emphasis added)

[21] Sections 67(1) to (3) illustrate the special status given to the Term of any collective agreement. The Term is important not just for the parties, but it also determines the timeliness of third-party proceedings, such as displacement (raid) and decertification applications. The *Code* prohibits the parties from changing their collective agreement's Term, since this action would impact the open periods for these types of proceedings:

> 67.(1) **Where a collective agreement contains no provision as to its term or is for a term of less than one year**, the collective agreement shall be deemed to be for a term of one year **from the date on which it comes into force** and shall not, except as provided by subsection 36(2) or with the consent of the Board, be terminated by the parties thereto within that term of one year.
>
> (2) **Nothing in this Part prohibits the parties to a collective agreement from agreeing to a revision of any provision of the collective agreement other than a provision relating to the term of the collective agreement.**
>
> (3) The Board may, on application made jointly by both parties to a collective agreement, order that the termination date of the collective agreement be altered for the purpose of establishing a common termination date for two or more collective agreements binding a single employer.
>
> (emphasis added)

IV–Analysis and Decision

A–Does section 49 establish a limited window for giving notice to bargain?

[22] Section 49(1) reads:

> 49.(1) Either party to a collective agreement may, **within the period of four months immediately preceding the date of expiration of the term of the collective agreement, or within the longer period that may be provided for in the collective agreement,** by notice, require the other party to the collective agreement to commence collective bargaining for the purpose of renewing or revising the collective agreement or entering into a new collective agreement.
>
> (emphasis added)

[23] The notice to bargain is a key element in the *Code*'s collective bargaining regime. The *Code* contemplates that, during the Term of a collective agreement, and even beyond, the parties will enjoy a period of industrial peace. For example, strikes and lockouts cannot occur, both during the Term

of the collective agreement and, in addition, following its expiration, until certain statutory pre-conditions in section 89(1) have been met:

> 89. (1) **No employer shall declare or cause a lockout and no trade union shall declare or authorize a strike unless**
>
> > (*a*) **the employer or trade union has given notice to bargain collectively under this Part**;
> >
> > (*b*) the employer and the trade union
> >
> > > (i) have failed to bargain collectively within the period specified in paragraph 50(*a*), or
> > >
> > > (ii) have bargained collectively in accordance with section 50 but have failed to enter into or revise a collective agreement;
> >
> > (*c*) the Minister has
> >
> > > (i) received a notice, given under section 71 by either party to the dispute, informing the Minister of the failure of the parties to enter into or revise a collective agreement, or
> > >
> > > (ii) taken action under subsection 72(2);
> >
> > (*d*) twenty-one days have elapsed after the date on which the Minister
> >
> > > (i) notified the parties of the intention not to appoint a conciliation officer or conciliation commissioner, or to establish a conciliation board under subsection 72(1),
> > >
> > > (ii) notified the parties that a conciliation officer appointed under subsection 72(1) has reported,
> > >
> > > (iii) released a copy of the report to the parties to the dispute pursuant to paragraph 77(*a*), or
> > >
> > > (iv) is deemed to have been reported to pursuant to subsection 75(2) or to have received the report pursuant to subsection 75(3);
> >
> > (*e*) the Board has determined any application made pursuant to subsection 87.4(4) or any referral made pursuant to subsection 87.4(5); and
> >
> > (*f*) sections 87.2 and 87.3 have been complied with.

(emphasis added)

[24] Parties are entitled to conduct their own affairs during the Term of the collective agreement without being constantly compelled to negotiate new working conditions. This situation continues until, at the earliest, four months preceding the expiration of the collective agreement's Term.

[25] Section 49(1) sets out when the parties can start a new bargaining cycle during the life of a collective agreement. For many experienced labour relations practitioners, the purpose of this type of provision is to limit only the earliest time when notice to bargain can be given. It is not intended to establish a limited window within which parties must give their notice to bargain.

[26] For example, the Sims Report (*Seeking a Balance: Canada Labour Code, Part I, Review* (Ottawa: Human Resources Development Canada, 1995)), which reviewed and recommended changes to Part I of the *Code*, suggested that the time period in section 49 be increased from the then three months to four months. It also referred to the general belief that any change would not add a new statutory end date to section 49:

> At present, the statute fixes a period from ninety days before the expiry of the collective agreement up until actual expiry, when a party to a collective agreement can give a notice to bargain. As we express elsewhere in this report, we are concerned with the length of time that bargaining takes under the present rules and with the adverse effects caused to the parties and others when bargaining carries on too long after the contract's expiry. Other recommendations on conciliation will address these concerns more directly. However, to encourage earlier attention to collective bargaining and to allow diligent parties to conclude a new agreement before the old agreement expires, we believe an earlier opening date is desirable. **This recommendation does not alter the parties' ability to extend the dates by agreement between themselves, nor does it set a statutory end date after which notice cannot be given.**
>
> (Sims Report, page 103; emphasis added)

[27] The Ontario Labour Relations Board (OLRB), albeit under differently worded legislation, has decided a notice to bargain provision did not set a time limit after which no notice could be given by either party:

9. More fundamentally, however, in our view the employer's argument misconceives the nature of the statutory scheme. Nowhere does the Act state that section 59(1) confers discretion upon the Minister. **The giving of notice of intention to bargain under section 59(1) simply triggers a number of rights and obligations under the Act by virtue of section 60. Stability of labour relations requires that a party not be able to trigger those rights and obligations during much of the term of a collective agreement. Hence, section 59(1) precludes notice from being given until the final ninety days of the collective agreement. It does not, however, provide that notice may only be given in the final ninety days of the collective agreement. The opposite conclusion would leave the parties bound to a collective bargaining relationship which neither party could enforce and it would thereby frustrate the scheme of the Act.**

(*Evans Lumber and Builders Supply Ltd.*, [2006] OLRB Rep. March/April 149) (*Evans*)

[28] The OLRB in *Evans*, *supra*, noted the consistency of its position over several decades:

10. This issue was reviewed in *Peel Memorial Hospital*, [1977] OLRB Rep. July 452, where the Board made the following statement, with which we agree:

> 27. **Section 45 [now section 59] does not say that if either party wants to give notice to bargain it *shall* be within the ninety day period. The purpose of providing a limited period at the end of an agreement for the giving of notice to bargain is to provide stability between the parties for as much of the agreement as possible**. At the same time, however, it is desirable to provide a sufficient time prior to the termination of the agreement to enable the parties to conclude, if possible and if desired, a successor agreement. Notice informs the other party and the public that negotiations will follow. Once notice is given certain rights, duties and obligations follow to enable the parties to carry out their negotiations.
>
> 28. ... **If the parties were precluded from being able to give effective section 45 notice to bargain after their collective agreement has been terminated by circumstances far beyond their control, the purpose and scheme of the Act would be frustrated. A panoply of rights, duties and obligations under the Act is triggered by, and only by, the giving of effective section 45 notice to bargain. If section 45 notice cannot be given in these circumstances, then, the negotiation process as envisioned by the Act cannot be set into motion**. Unless such notice is found to be effective under section 45 the parties will not be required to bargain in good faith; they will not be assured of an undisturbed atmosphere in which to commence their negotiations because they will become immediately subject to the possibility of displacement and termination applications; they will not be able to obtain the services of a conciliation officer and they will not be able to engage in a legal strike or lockout.

> **29. In view of the considerations set out above the Board finds that the time period set out in section 45 is directory not mandatory and that notice given after the termination of a collective agreement may be effective notice under section 45 of the Act.**

(emphasis added)

[29] Evidently, the general understanding of labour relations practitioners, comments in the Sims Report, and/or decisions under differently worded labour legislation do not determine conclusively how the Board should interpret section 49 in the *Code*. But neither are they completely foreign to the Board's analysis.

[30] Competing arguments exist both in favour of, and against, section 49 creating a limited window for the delivery of a notice to bargain. Indeed, the existence of competing arguments prompted the Board to write the parties asking for further comment on items such as section 51 of the *Code*.

[31] The fact that the *Code* uses the word "may," rather than "shall," supports the notion that section 49 only establishes the earliest date when parties can give notice to bargain. As the OLRB observed, this made a notice to bargain provision in their legislation directory rather than mandatory.

[32] The possible legal void which would be created if a party failed to give notice within this alleged "window" is difficult to reconcile with the overall purpose of the *Code*'s collective bargaining regime. The Board will examine the City's arguments in this regard later in these reasons.

[33] In *VIA Rail Canada Inc.*, 2011 CIRB 569 (*VIA 569*), the Board decided, in the absence of any extension agreed to by the parties, that a notice sent more than four months before the expiration of the Term was void.

[34] However, *VIA 569* did not address what might happen if notice to bargain was given after the four-month period i.e. following the expiration of the collective agreement's Term.

[35] It is rare for one of the parties not to give notice to bargain before the end of the current collective agreement given the various consequences which follow.

[36] For example, unlike in this case, if the collective agreement does not contain a bridging clause which keeps employees' terms and conditions of employment in force, then the failure to give notice to bargain deprives employees of the benefit of the statutory freeze in section 50(*b*). That statutory freeze is not automatic, but is conditional on the giving of notice to bargain:

> Duty to bargain and not to change terms and conditions
>
> 50. **Where notice to bargain collectively has been given under this Part**,
>
> ...
>
> (*b*) **the employer shall not alter the rates of pay or any other term or condition of employment or any right or privilege of the employees in the bargaining unit**, or any right or privilege of the bargaining agent, until the requirements of paragraphs 89(1)(*a*) to (*d*) have been met, unless the bargaining agent consents to the alteration of such a term or condition, or such a right or privilege.
>
> (emphasis added)

[37] Similarly, the notice to bargain imposes the obligation on the parties to meet to negotiate.

[38] In this case, the IAFF argued that article 36.05 of the collective agreement created a "longer period", as that expression is used in section 49(1) of the *Code,* for the giving of notice to bargain:

> 36.05 The Employer and Local 2890 shall choose a mutually acceptable date to discuss Collective Agreement no more than four (4) months immediately preceding the date of the expiration of the term of the collective agreement.

[39] In the IAFF's view, article 36.05 allowed bargaining to commence on any date, even after the collective agreement had expired. The IAFF argued the wording of article 36.04 kept the collective agreement in force after the expiry date, until the parties concluded a new collective agreement.

[40] The City contested the IAFF's interpretation. In its view, the wording of article 36.05 simply does not deal with the timing of the giving of a notice to bargain. Moreover, the City argued the *Code* did not allow the parties to change the Term of a collective agreement. Therefore, as the Board understands the City's argument, the parties could increase the four-month period preceding the end of the collective agreement's Term, for the giving of notice to bargain. But they could not extend that Term in order to allow for a notice to bargain to be given after December 31, 2011 (section 67(2)).

[41] In its initial review in this case, the Board examined other provisions in the *Code* to see if they provided assistance in interpreting section 49. During this analysis, section 51, which deals with technological changes, came to light:

> 51.(1) In this section and sections 52 to 55, "technological change" means
>
> > (*a*) the introduction by an employer into their work, undertaking or business of equipment or material of a different nature or kind than that previously utilized by the employer in the operation of the work, undertaking or business; and
> >
> > (*b*) a change in the manner in which the employer carries on the work, undertaking or business that is directly related to the introduction of that equipment or material.
>
> (2) Sections 52, 54 and 55 do not apply, in respect of a technological change, to an employer and a bargaining agent who are bound by a collective agreement where
>
> > (*a*) the employer has given to the bargaining agent a notice in writing of the technological change that is substantially in accordance with subsection 52(2),
> >
> > > (i) prior to the day on which the employer and the bargaining agent entered into the collective agreement, if the notice requiring the parties to commence collective bargaining for the purpose of entering into that collective agreement was given pursuant to section 48, or
> > >
> > > (ii) **not later than the last day on which notice requiring the parties to commence collective bargaining for the purpose of entering into the collective agreement could have been given pursuant to subsection 49(1)**, if the notice was given under that subsection;

> (*b*) the collective agreement contains provisions that specify procedures by which any matters that relate to terms and conditions or security of employment likely to be affected by a technological change may be negotiated and finally settled during the term of the agreement; or
>
> (*c*) the collective agreement contains provisions that
>
> > (i) are intended to assist employees affected by any technological change to adjust to the effects of the technological change, and
> >
> > (ii) specify that sections 52, 54 and 55 do not apply, during the term of the collective agreement, to the employer and the bargaining agent.

(emphasis added)

[42] The City argued that the words in section 51(2)(*a*)(ii) "... not later than the **last day** on which notice requiring the parties to commence collective bargaining... could have been given pursuant to subsection 49(1)...", confirmed the existence of a time-limited window for any notice to bargain.

[43] On a technical level, the City's argument is intriguing. On a practical level, that proposition seems completely at odds with the *Code*'s collective bargaining regime and raises several questions.

[44] For example, what happens if a party fails to respect the alleged four-month limited window? Can notice ever be given again? Or does collective bargaining simply go into a permanent state of suspended animation? Moreover, should any solution to this dilemma be subject to the wording of private collective agreements?

[45] The City's answer to some of these potential consequences came both from section 67(1) of the *Code* and provisions in its collective agreement. We will examine those in the next section.

B–Does section 67(1) of the *Code*, or the provisions in the parties' collective agreement, address the consequences arising if section 49 creates a limited window within which to provide notice to bargain?

[46] Section 67(1) to (3) reads:

> 67.(1) **Where a collective agreement contains no provision as to its term or is for a term of less than one year**, the collective agreement shall be deemed to be for a term of one year from the date on which it comes into force and shall not, except as provided by subsection 36(2) or with the consent of the Board, be terminated by the parties thereto within that term of one year.
>
> (2) Nothing in this Part prohibits the parties to a collective agreement from agreeing to a revision of any provision of the collective agreement **other than a provision relating to the term of the collective agreement.**
>
> (3) The Board may, on application made jointly by both parties to a collective agreement, order that the termination date of the collective agreement be altered for the purpose of establishing a common termination date for two or more collective agreements binding a single employer.
>
> (emphasis added)

[47] The City argued that section 67(1) of the *Code* effectively renewed its collective agreement with the IAFF for one year. As a consequence, it suggested that the IAFF could not give notice to bargain until September, 2012, i.e. four months before the expiration of this "new" collective agreement.

[48] The problem with this "new collective agreement" argument is that the City's fact situation simply does not fit within the wording of section 67(1). There are two reasons why.

[49] First of all, section 67(1) applies to a collective agreement which contains no provision regarding its Term. The City's collective agreement, in article 36.01, contains an explicit three-year Term from January 1, 2009 to December 31, 2011.

[50] Secondly, section 67(1) may also apply to a collective agreement which has a Term of less than one year. Again, the City's collective agreement, with a clear three-year Term, does not meet this pre-condition.

[51] Crucial as well to the City's arguments about section 67(1) is article 36.04 in the collective agreement:

> 36.04 Unless otherwise stipulated, **this Agreement shall remain in force after the expiry date until a new Collective Agreement becomes effective**. There shall be no strike, walkout, slow- down [*sic*], or suspension of work by any member(s) of Local 2890, or any lock-out of employees by the Employer.
>
> (emphasis added)

[52] The City argued that article 36.04, combined with section 67(1), resulted in a new one-year collective agreement.

[53] The Board commented above why section 67(1) alone cannot assist the City since its collective agreement had an explicit three-year Term. Similarly, the Board fails to see how a bridging clause, like the one found in article 36.04, which merely keeps the existing terms and conditions of the expired collective agreement in force until the parties conclude a new one, can simultaneously create a brand new collective agreement to which the provisions of section 67(1) apply.

[54] There is a difference in labour relations between an automatic renewal clause for a collective agreement, and a bridging clause. An automatic renewal clause simply replaces bargaining if neither party provides notice to bargain before the expiration of the Term. The *Code*'s minimum "open periods" are respected, though a new collective agreement comes into force upon the expiration of that Term.

[55] In contrast, the Board recently examined a bridging clause in *Canada Post Corporation*, 2012 CIRB 627 (*CPC 627*). That type of clause maintains employees' existing terms and conditions of employment in force and, depending on its wording, could add to the parties' respective rights following the end of the *Code*'s statutory freeze.

[56] A bridging clause, just like the *Code*'s statutory freeze, maintains employees' terms and conditions of employment. Neither keep the underlying collective agreement in force beyond the expiration of its Term: *Bradburn* v. *Wentworth Arms Hotel*, [1979] 1 SCR 846 (*Bradburn*).

[57] It would have been simple for Parliament to include in the *Code* an automatic renewal provision for a collective agreement if a party failed to respect the alleged limited window in section 49. Section 67(1) is not that type of provision.

[58] The City's argument is further problematic since it makes the interpretation of the *Code* unreliably fluid. *Code* interpretations would depend on the specific terms of the parties' collective agreement. The Board prefers interpreting the *Code* in a way that will be consistent for all those who come within federal jurisdiction.

C–Does section 48 apply to the current situation?

[59] Section 48 reads:

> 48. **Where the Board has certified a bargaining agent for a bargaining unit and no collective agreement binding on the employees in the bargaining unit is in force**, the bargaining agent may, by notice, require the employer of those employees, or the employer may, by notice, require the bargaining agent to commence collective bargaining for the purpose of entering into a collective agreement.
>
> (emphasis added)

[60] The Board asked both parties for their comments on the impact of section 48 in the *Code* on the IAFF's January 13, 2012 notice. The City argued that section 48 could not apply because a collective agreement was in force as a result of article 36.04. The IAFF argued section 48 applied only for first collective agreement situations.

[61] With respect, the Board does not agree with either position.

[62] The text of section 48 does not suggest it may only be used for first contract situations. The two explicit conditions Parliament imposed for notice under section 48 are: a) a Board certification and b) no collective agreement binding on the employees is in force. Evidently, condition "a" has been met since the Board certified the IAFF.

[63] Similarly, as explained below, condition "b", for the purposes of the *Code*, has also been met.

[64] From the *Code*'s perspective, the IAFF and the City's collective agreement expired on December 31, 2011: *Bradburn*, *supra*. That collective agreement's Term, which the *Code* prohibits the parties from changing, establishes various entitlements for third parties, including the timeliness of displacement (raid) and decertification applications.

[65] The parties may negotiate provisions, such as that in article 36.04, which arguably provides greater benefits than those found in the *Code*'s freeze, strike and lockout provisions. But those privately-negotiated provisions do not impact how the Board interprets the *Code* or the rights of third parties.

[66] The Board focusses on parties' rights under the *Code*, such as the scope of section 50's statutory freeze. For matters like the interpretation of a bridging clause, however, the Board explained in *CPC 627*, *supra*, that the issue should be sent to the parties' arbitration process:

> [70] It was open to the Legislator to extend the statutory freeze until the start of a lawful lockout or strike, just as it exists in Quebec. But the 1999 *Code* amendments did not make this change to the duration of the statutory freeze.
>
> [71] The Board has been satisfied that an employer may decide no longer to apply the expired collective agreement once the freeze ends and the Interim Period begins. But this finding does not resolve this particular case.
>
> **Deferral to Arbitration**
>
> [72] The Board asked the parties, both at the oral hearing and in its follow-up letter dated September 23, 2011, about the relevance of article 43.02 of their collective agreement to this matter:
>
> > During argument, the Board asked the parties whether its interpretation of section 50(*b*) [*sic*] of the *Canada Labour Code (Part I–Industrial Relations)* might be inextricably linked to section 43.02 of the Collective Agreement. A policy grievance is proceeding shortly on the issue of the interpretation of section 43.02. If the parties have any comments to add about the Board's question, they may do so in their written submissions.
>
> [73] CUPW, in its November 9, 2011 letter to the Board, reiterated that the case raised important issues the Board should decide. CUPW had also argued in its submissions, in the alternative, that CPC, by negotiating article 43.02, had given up any right it might have had under the *Code* to alter employees' terms and conditions of employment following the expiration of the statutory freeze.
>
> [74] CPC argued that article 43.02 had no relevance to the CIRB's interpretation of section 50(*b*) of the *Code*. CPC ended its comments stating:

> 57. Canada Post requests that the CIRB deal with the section 50(*b*) issue. CUPW's arguments respecting Article 43.02 of the Collective Agreement are distinct and should be dealt with in arbitration.

[75] The Board in *ADM Agri-Industries Ltd.*, 2002 CIRB 206, previously observed that parties to a collective agreement may decide to negotiate a bridging clause to extend the *Code*'s statutory freeze:

> [43] For these reasons, we find that although the *Code* is silent on the possibility that parties may negotiate bridging clauses designed to extend the effects of their collective agreement, such clauses are valid and must be interpreted in such a way as to give them the effect contemplated by the parties, to the extent that they do not contravene the *Code*'s provisions. Thus, we concur with the original panel's statement [*ADM Agri-Industries Ltd.*, 2001 CIRB 141] when it states:
>
> > [19] ... Consequently, the collective agreement should be interpreted in light of the objectives of the *Code*, as set out in its preamble, and with the intention of establishing a framework for good working conditions and sound labour-management relations. Therefore, the collective agreement and the *Code* should be interpreted as a whole.
> >
> > (page 7)
>
> [44] The present panel is of the opinion that nothing in the *Code* prevents the parties from mutually agreeing to extend the *Code*'s minimum protection. Parties can agree to extend the *Code*'s freeze period related to the terms and conditions, just as they may negotiate benefits that go beyond the minimum labour standards prescribed by legislation. This is true to the extent that this agreement does not challenge the parties' opportunities to exercise other rights recognized by the *Code*, including the right to strike or lockout.
>
> ...
>
> [46] The purpose of clause 34.01 of the collective agreement is to create a bridge between the time the parties have acquired the right to strike or lockout and the time that right is effectively exercised. That clause in no way limits the parties' opportunity to exercise their right to strike or lockout, but merely extends the freeze period of the terms and conditions of employment set out in section 50(*b*) of the *Code*.
>
> (emphasis added)

[76] Section 98(3) of the *Code* allows the Board to refuse to determine a complaint brought under section 97(1) when the matter can be dealt with by an arbitrator under the parties' collective agreement.

> 98.(3) The Board may refuse to determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board.

[77] Section 97(1) of the *Code* includes complaints about a violation of the statutory freeze:

> 97. (1) Subject to subsections (2) to (5), any person or organization may make a complaint in writing to the Board that
>
> (*a*) an employer, a person acting on behalf of an employer, a trade union, a person acting on behalf of a trade union or an employee has contravened or failed to comply with subsection 24(4) or 34(6) or section 37, 47.3, 50, 69, 87.5 or 87.6, subsection 87.7(2) or section 94 or 95; or
>
> (*b*) any person has failed to comply with section 96.
>
> (emphasis added)

[78] CUPW advised it filed its complaint because the Board would be able to deal with the matter more quickly than the parties' arbitration process. However, the Board is satisfied that the resolution of the complaint involves both the *Code* and the parties' bridging clause in their collective agreement.

[79] While the Board would have been prepared to give the parties a final answer in a timely manner by interpreting their bridging clause, the Board will not do so when one of the parties objects. The parties' arbitration process will have to take its course.

[80] Therefore, even though the arbitration process had not yet started when the Board heard oral argument in this case, the Board, pursuant to section 98(3), will not determine CUPW's section 97(1) complaint that CPC violated the freeze. Since the parties differ over how to interpret their bridging clause, and its specific reference to section 89(1) of the *Code*, the essence of the matter will be resolved by an arbitrator.

[67] In the Board's view, even if it accepted the City's interpretation of section 49, a determination which can be left for another day, the fact remains that nothing prevented the IAFF's January 13, 2012 notice from meeting the requirements of section 48.

[68] The arguments made that the parties' collective agreement remained in force after the expiration of its Term are incorrect. This Board's predecessor, the Canada Labour Relations Board (CLRB), described the effects of a bridging clause in *Air Canada* (national) (1988), 72 di 169; and 88 CLLC 16,010 (CLRB no. 669), at page 179:

> Finally, with regard to the issue of the bridging clause, if the Board were to accept the proposition put forward by the union, it would mean that the provisions of a collective agreement could conceivably take precedence over statutory provisions. For example, it would override the provisions of the *Code* dealing with the time when a raid could take place, and it would preclude recourse to the right to strike or lockout as provided in the *Code*. Whereas it **might** be conceivable that the parties can bargain out of the right to strike or lockout (although we do not say that they can), we do not see how the parties can, by entering into a bridging clause, affect the right of third parties who statutorily, under the circumstances provided in the *Code*, have the right to attempt to raid an incumbent union. Thus, it is our conclusion that unquestionably the provisions of a collective agreement must come to an end and, in the instant case specifically, they did once the conditions in section 180 had been met.
>
> (emphasis in original)

[69] Therefore, for the purposes of the *Code*, once the parties' collective agreement expired on December 31, 2011, and in the absence of any notice to bargain, no collective agreement was in force. The notice that the IAFF gave on January 13, 2012, even if beyond any alleged window in section 49, therefore satisfied the two requirements in section 48 of the *Code*.

[70] The use of notice under section 48 for new agreements, but also as a fail safe provision for other bargaining relationships which might have lapsed for various reasons, protects the integrity of the *Code*'s collective bargaining regime. It avoids the legal void which could arise if one accepted the logical conclusions flowing from the City's arguments.

V–Conclusion

[71] The IAFF alleged that the City violated section 50 of the *Code* when it refused to negotiate after receiving notice to bargain on January 13, 2012. The City alleged that it had no obligation to negotiate.

[72] The parties' positions were novel, most likely because trade unions with collective agreements give notice during the four-month period contemplated by section 49 of the *Code*. In cases where the trade union may not wish to commence bargaining, the employer is usually anxious to do so.

[73] The Board finds that, pursuant to section 48 of the *Code*, the IAFF gave valid notice to bargain on January 13, 2012. This conclusion eliminates the need to carry out a more exhaustive statutory analysis of section 49.

[74] However, due to the novel issue in this case, the Board has decided to dismiss the IAFF's ULP complaint. In rare cases, where the parties take opposing legal positions in good faith about a novel issue, the Board may decide to dismiss the complaint and instead allow the parties to proceed with their bargaining: *VIA 569*, *supra*.

[75] The Board's decision contemplates that the parties will now meet to negotiate a renewal of the collective agreement which expired, for purposes of the *Code*, on December 31, 2011. Any additional disputes arising from the parties' collective agreement are a matter for arbitration, as was the case in *CPC 627*, *supra*.

[76] This is a unanimous decision of the Board.

Graham J. Clarke
Vice-Chairperson

John Bowman
Member

André Lecavalier
Member